

No. 15531

United States
Court of Appeals
for the Ninth Circuit

G. ABRAMSON and HOWARD MILLER,
Appellants,
vs.

GEORGE GARDNER, Trustee in Bankruptcy of
the Estate of Feldman-Selje Corporation,
Bankrupt,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

No. 74,412—TC

In the Matter of:

FELDMAN-SELJE CORP.,

Bankrupt.

HEARING ON ORDER TO SHOW CAUSE,
GARDNER VS. ABRAMSON, ET AL., MO-
TION BY RESPONDENT TO DISMISS
PETITION

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came on for hearing before the Honorable Howard V. Calverley, United States Referee in Bankruptcy, at his courtroom, 339A Federal Building, Los Angeles, California, at the hour of 2:00 p.m., Thursday, October 25, 1956.

Appearances:

GEORGE GARDNER,

Receiver.

W. J. TIERNAN,

Appearing on Behalf of the Respondent.

The Referee: I will call the matter of Feldman-Selje Corporation, Bankrupt, No. 74,412—TC, Order to Show Cause, Gardner against Abramson, et al. I might state the schedules were filed this afternoon at 1:00 o'clock in this case.

Mr. Gardner: I presume, Mr. Tiernan, it will be

stipulated that the evidence adduced in connection with your motion to dismiss may be considered as evidence in the main case if your motion to dismiss is not granted.

Mr. Tiernan: That is certainly agreeable.

The Referee: That will save time.

Mr. Gardner: Mr. Fishman, will you take the stand?

Mr. Tiernan: I am ready to argue the motion.

Mr. Gardner: I am not ready yet.

The Referee: I think you had better put your evidence in and argue it afterward so the witnesses may be excused.

Mr. Gardner: Will you take the stand, Mr. Fishman?

STANLEY J. FISHMAN

called as a witness on behalf of the Receiver, having been first duly sworn, testified as follows:

The Referee: State your full name.

A. Stanley J. Fishman.

The Referee: Very well. You may proceed. [2*]

Direct Examination

By Mr. Gardner:

Q. Mr. Fishman, you are attorney for G. Abramson?
A. That is correct.

Q. Who is G. Abramson? Is he someone in your office?

A. That is correct. She is the secretary in the office.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Stanley J. Fishman.)

Q. She is an assignee of the claim of Meridan Furniture Company, Inc.?

A. That is correct.

Q. And also of Style Laminates, Inc.?

A. That is right.

Q. Those are creditors of Feldman-Selje Corporation. Is that right? A. That is right.

Q. You were her attorney and as such attorney you brought the Superior Court suit No. 665,581 against the Bankrupt?

A. I think that is the number. May I have my file, your Honor?

The Referee: Yes.

Mr. Tiernan: That is the number I have.

The Witness: Yes; that is correct.

Q. (By Mr. Gardner): That suit was filed on August 24, 1956, wasn't it?

A. Yes; that is correct; August 24. [3]

Q. At that time you caused the Marshal of the Municipal Court to levy a writ of attachment which was levied on August 27, 1956, a Monday, is that correct?

A. The suit was filed on Friday and the keeper was placed in the premises on Monday.

Q. If I told you August 27 was Monday, would that be the date? A. That is correct.

Q. Subsequently, about September 7, 1956, you obtained judgment by default against the Bankrupt, didn't you? A. Yes; that is correct.

Q. You got a writ of execution on it and you caused the Marshal to set an execution sale?

(Testimony of Stanley J. Fishman.)

A. That is true.

Q. When the execution sale came up it was on September 12, was it not? A. That is right.

Q. At that time there was a claim by the holders of an alleged chattel mortgage claiming all of the machinery and equipment, was there not?

A. In part, yes. They claimed a lot more than the machinery and equipment. They claimed office furniture and mostly everything.

Q. Then the Marshal of the Municipal Court offered for sale everything that was not included in that claim. [4] Is that right?

A. There were about three third-party claims. Everything that was not included in any of the third-party claims was offered for sale.

Q. At that execution sale the plaintiff, G. Abramson, was the purchaser?

A. Yes, but through myself as her attorney.

Q. You made a bid for \$500?

A. That is true.

Q. That \$500 was given as credit on the judgment in court? A. Yes.

Q. You did not pay any \$500 to the Marshal?

A. No. The \$500 was entered as a credit on the judgment.

Q. Subsequently you sold these same items to Howard Miller for \$500 in cash, didn't you?

A. That is true.

Q. Were any of these items ever removed from the place of business of the Bankrupt?

(Testimony of Stanley J. Fishman.)

A. I have no knowledge of that. I cannot answer from my own knowledge.

Q. Were you aware of the fact that the Bankrupt corporation had been negotiating with its creditors to try to get a settlement of the situation with them? A. With his creditors? [5]

Q. Yes. A. I was very much aware of it.

Q. You were very much aware of it. You knew the financial condition of the Bankrupt, did you not? A. Yes.

Q. As a matter of fact, you knew that it was insolvent, didn't you?

A. Yes. Your Honor, I believe I can shorten these proceedings with Mr. Gardner's permission.

The Referee: Go ahead.

The Witness: Out of the \$500 that Mr. Miller paid for the assets I bought for \$500 as a credit and sold for \$500 in cash in turn. I agree to turn that \$500 over to whomsoever the Court directs, reserving any right I may have to file a petition, that the attachment was made for the benefit of all creditors, and I should be allowed my costs. But I have the \$500 and I will agree to return it.

Q. (By Mr. Gardner): As I understand your testimony, you do not now assert that you claimed any adverse interest to other creditors when you bought this. You were doing it for the benefit of all creditors?

A. Not at this point. At this time my testimony is that I will turn the \$500 over to whomsoever the Court directs without contesting any preference ac-

(Testimony of Stanley J. Fishman.)

tion, to save you the trouble of bringing a preference action. That is all my testimony is for. [6]

Q. You were aware of the insolvent condition of the Bankrupt, weren't you? A. Yes.

Q. At the time you bought this in?

A. Yes.

Q. Howard Miller bought from you, didn't he?

A. Yes.

Mr. Gardner: You may cross-examine.

Cross-Examination

By Mr. Tiernan:

Q. Mr. Fishman, you attended the sale and made a bid of \$500 which was credited upon the judgment? A. Yes.

Q. Were other persons present at this sale?

A. Yes.

Q. Other bidders? A. Yes.

Q. Were other bids made?

A. Yes. There were about forty persons present.

Q. Were other bids made? A. Yes.

Q. What was the lowest bid made?

A. The bids started at \$50.

Q. What was the highest bid?

A. The highest bid was \$125. It was going to go for [7] \$125, and since I had a judgment for \$4,000 I didn't want to see it go for \$125, so I entered a bid of \$500 which was the top bid.

Q. Thereafter, on behalf of your client you ne-

(Testimony of Stanley J. Fishman.)

gotiated a sale of the personal property to one G. Abramson?

A. No; that is not correct. Howard Miller, my client.

Q. I beg your pardon. Howard Miller?

A. Yes.

Q. Did you execute a bill of sale to this personalty in favor of Mr. Miller? A. Yes; I did.

Q. Is this the bill of sale I am handing you?

A. Yes.

Mr. Tiernan: Do you have any objection to this, Mr. Gardner?

Mr. Gardner: None whatsoever.

The Referee: It may be received as Respondent Miller's Exhibit 1.

Q. (By Mr. Tiernan): Mr. Fishman, you mentioned in connection with your attachment that you had incurred certain costs for which you desired to reserve your rights to petition this Court for should you turn in this \$500. Can you tell me now what those costs amount to?

A. No; I couldn't tell you now. I have all of that [8] information in my office, the itemization of the costs. They were quite considerable because the keeper was on the premises from the 26th, after the suit was filed, all through the statutory period allowed to answer and for the period allowed for advertising of the execution sale. I roughly estimate they were in the vicinity of \$300 or possibly a little more or less.

Mr. Tiernan: I have nothing further.

Mr. Gardner: That is all, your Honor.

The Referee: You may step down.

(Witness excused.)

Mr. Gardner: I will call Murray Feldman.

MURRAY FELDMAN

called as a witness on behalf of the Receiver, having been first duly sworn, testified as follows:

The Referee: State your name, please.

A. Murray Feldman.

Direct Examination

By Mr. Gardner:

Q. Mr. Feldman, you were president of Feldman-Selje Corporation, the Bankrupt?

A. Yes.

Q. You were its president all during the month of August of this year? A. Yes. [9]

Q. You have filed on behalf of the corporation schedules in bankruptcy. May I ask you to look at the schedules, particularly the summary of debts and assets which shows debts of \$66,301.42 and assets of \$49,750?

Is that the condition of the Bankrupt financially as of the date of the filing of the petition in bankruptcy against it?

A. To the best of my knowledge, yes, it is.

Q. Was the financial condition of the Bankrupt any different from this present condition on August 27, the date of the attachment?

(Testimony of Murray Feldman.)

A. No; it was not.

Q. It was exactly the same? A. Exactly.

Q. Mr. Feldman, the Bankrupt had been trying to settle with its creditors for some time before this attachment, had it not?

A. We sent out a letter to all our general creditors between ten days and two weeks before the date of the attachment.

Q. Did that letter advise them of the financial condition of the Bankrupt?

A. It enclosed a balance sheet.

Q. Did the balance sheet show approximately the same figures that you have shown here?

A. The balance sheet was as of May 31 and [10] the condition was not quite as bad, but almost so.

Q. The company was insolvent? A. Yes.

Q. The statements showed that. Is that right?

A. Yes.

Q. Did a copy of that go to the Meridan Furniture Company, one of the creditors? A. Yes.

Q. Did a copy likewise go to Style Laminates, Inc.? A. Yes.

Mr. Gardner: You may cross-examine.

Mr. Tiernan: I have no questions.

Mr. Gardner: That is all.

The Referee: Very well. You may step down.

(Witness excused.)

Mr. Gardner: Will it be stipulated that I, as Receiver in Bankruptcy, am in possession of the items which were purported to have been sold?

Mr. Tiernan: I would be happy to take your statement, Mr. Gardner.

Mr. Gardner: All right. I will make a statement to that effect.

The Referee: You may be sworn, Mr. Gardner. Mr. Fishman said the only property sold was the property to which a third-party claim was made.

Mr. Gardner: That is right. [11]

The Referee: Very well. You may proceed.

GEORGE GARDNER

the Receiver herein, appearing in propria persona, having been first duly sworn, testified as follows:

I am the Receiver in this matter, having been so appointed on October 12, 1956. I caused the premises of the Bankrupt, located at 910 East Fourth Street, Los Angeles, California, and at 847 East Fourth Street, Los Angeles, California, to be taken over by my agent. I caused an inventory to be prepared which inventory is on file. I would like to introduce that inventory by reference.

The Referee: I don't see it in this file.

The Witness: It may be in the hands of the appraiser.

Mr. Tiernan: That is all right. What do you expect to prove?

The Witness: I expect to prove the values of the various items of property.

Mr. Tiernan: Is there an appraisal?

The Witness: The appraisal blank has gone out. This is an inventory. I will offer the inventory.

(Testimony of George Gardner.)

Mr. Tiernan: May I see it?

The Witness: You may see my office copy.

Mr. Tiernan: Very well. [12]

The Witness: The other is apparently out in the hands of the appraiser.

Mr. Tiernan: Are you able to relate the inventory items to the items sold at the sale?

The Referee: Are you able to tell which items were sold at the sale?

A. I think the items sold at the sale were what are known as supplies and stock as listed on the inventory, one being \$320.50 which is located at 910 East Fourth Street, and the other being supplies and stock inventoried at \$2,419.42, located at the other address of the place of business, 841 East Fourth Street. It is my understanding that constitutes the items which were attempted to be sold at the execution sale.

The Referee: I don't see how you can dispute the value of it unless you had your appraiser here.

The Witness: That is right. I would like then to be allowed the opportunity to introduce the appraisal as and when we receive it, as proof——

The Referee: As proof of the question of value?

A. I am still in possession of all this property. I am attempting to have all of the property sold by an auctioneer. I have a stipulation from the holder of the alleged chattel mortgage which will authorize the sale of the property claimed by them, being the office furniture, machinery, equipment and fixtures. I want to include the [13] supplies

(Testimony of George Gardner.)

and stock which is the property about which we are bringing this motion.

Q. How much rent is the Bankrupt obligated to pay where the merchandise is located?

A. \$587.50 a month.

Q. In both places?

A. The two together. You cannot move it. It will cost too much to consolidate it in one.

Q. If these particular items which were sold were not auctioned or otherwise sold at this time, how much bulk would they have?

A. They have considerable bulk. This has been work in process, desks partially completed. Perhaps Mr. Feldman can explain it better than I can.

Mr. Feldman: That is it exactly.

The Witness: Parts of desks not put together, parts in process.

The Referee: Mr. Feldman, you can answer from where you are sitting. How much space proportionately speaking do these items which were sold at the execution sale occupy in proportion to everything else that the company owns?

Mr. Feldman: Our total square footage was 15,000 feet. I would say that if everything was stored and stacked it could be done without damage to merchandise in a space of somewhere around 3,000 feet. [14]

The Referee: That would be all of the merchandise?

Mr. Feldman: Not including the machinery.

The Referee: But the items that were properly

(Testimony of George Gardner.)

sold at this execution sale, you believe it would take approximately 3,000 square feet to store it properly?

Mr. Feldman: Yes.

Mr. Gardner: Do you have any questions?

Mr. Tiernan: No questions.

The Referee: I will give you an opportunity to present that appraisal when it comes in, Mr. Gardner.

Mr. Gardner: Thank you, your Honor.

The Referee: Anything further?

Mr. Gardner: Just a moment. I want to be sure I have everything. I want to ask for one stipulation. If I cannot get it I will put Mr. Fishman back on the stand. That is the fact that none of this property alleged to have been sold was removed from the property. Is that correct, Mr. Fishman?

Mr. Fishman: No. I wouldn't say that because after the execution sale there was a couple of time-clock men who came to me and said, "You bought all these things at the execution sale. We didn't file third-party claims. Our timeclocks are on lease. Can we take the timeclocks?"

I said, "Yes, you can take the timeclocks." The matter was not in bankruptcy. As far as I knew, it was all right for them to take the timeclocks. [15]

Mr. Gardner: What about the other items? Are they still there?

Mr. Fishman: The cut wood and parts of desks?

Mr. Gardner: Yes.

Mr. Fishman: So far as I know, nothing has been removed.

(Testimony of George Gardner.)

Mr. Tiernan: I believe that is correct.

Mr. Fishman: I would like to state after it was sold to Mr. Miller I never visited the premises and I don't know what happened after that.

Mr. Gardner: I might state on my part that so far as anything being taken out of there other than what is in there now, I am not concerned with in this matter. I am only after what is there.

The Referee: Very well.

Mr. Gardner: That is all. I am ready to argue.

The Referee: Before you do that, Mr. Gardner, you submitted a petition to sell the assets through an auctioneer?

Mr. Gardner: Yes, and I have an order on it.

The Referee: Was it your object to have this property sold by an auctioneer?

Mr. Gardner: It is my idea to have it all sold by the auctioneer, including this property, because I think it would be to the best interests of all creditors. If I am successful in the order to show cause, it would be sold. [16]

The Referee: I have executed an order authorizing the Receiver to sell the assets, but it was executed after this notice of motion to dismiss was filed. I think the order would be premature unless it applies to merchandise that is not included.

Mr. Gardner: It does apply to it. It applies to everything under the stipulation.

The Referee: To everything?

Mr. Gardner: If I am successful in this order to

(Testimony of George Gardner.)

show cause, then I would sell this property, also, to the public at public sale.

The Referee: I think perhaps I should withhold entry of the order until this matter is decided.

Mr. Gardner: Very well. I will tell the autioneer to hold up.

The Referee: Yes. Withhold the execution of the order you filed yesterday at 9:00 a.m. At 3:00 p.m. in the afternoon, 3:35 p.m., this Notice of Motion was filed. They were not submitted to me together. I assumed you were in agreement or something of that sort. That was the reason I signed the order, but I will withhold the execution of it. I think perhaps the best way would be to eradicate the signature and not allow it to be considered an executed order, otherwise I will make an order withholding it until further discussion.

Mr. Gardner: Your Honor misunderstands me. I would [17] like to proceed at least with the sale of the stuff that is under the chattel mortgage on which I have a stipulation.

The Referee: Then perhaps I had better let the order stand with the understanding that the other articles will not be sold unless——

Mr. Gardner: I am not selling them unless I am successful here:

The Referee: Then I will let the order stand. You may prepare to go ahead with the other without delay.

Mr. Gardner: That is what I am trying to do, save \$600 a month rent.

(Testimony of George Gardner.)

The Referee: I see the reason for your haste.

Mr. Fishman: May I ask Mr. Gardner a question?

The Referee: Yes.

Mr. Fishman: Mr. Gardner seemed to be slightly hazy as to which items on the appraisal were not sold at the execution sale. Do you have any copies of the third-party claims filed with the Marshal? There would be no problem if you do because they specifically list everything not sold.

Mr. Gardner: I have a copy of one that was filed which covers everything claimed by the holders of the chattel mortgage.

Mr. Fishman: There were three third-party claims. That would be the only exact way to separate the wheat from the [18] chaff.

The Referee: You would simply take the third-party claims and what would be left over was sold, what was not subject to chattel mortgage?

Mr. Fishman: That is my thought.

The Referee: It is a process of elimination.

Mr. Fishman: Yes.

The Referee: Before the auctioneer proceeded he would make sure what he was selling was within the order.

Mr. Gardner: Whatever copies of the claims that you have I would appreciate having because I have only one.

The Referee: All right, Mr. Tiernan.

(Argument omitted.) [19]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter, do hereby certify that the foregoing nineteen (19) pages comprise a true and correct transcript of the proceedings had in the above-entitled matter.

Dated this 28th day of November, 1956.

/s/ BYRON OYLER,
Official Reporter.

[Endorsed]: Filed November 30, 1956.

[Endorsed]: No. 15531. United States Court of Appeals for the Ninth Circuit. G. Abramson and Howard Miller, Appellants, vs. George Gardner, Trustee in Bankruptcy of the Estate of Feldman-Selje Corporation, Bankrupt, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 19, 1957.

Docketed: April 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

